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No. 209

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

EARL J. LOMBARD AND GUARDIAN INVESTMENT CORPORATION, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Counsel, on behalf of Earl J. Lombard and Guardian Investment Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cases on March 16, 1965. (The cases were consolidated on appeal, by Order of the Court of Appeals of September 4, 1964, because of the identity of the factual and legal issues. A single petition is filed in accordance with rule 23(5) of the rules

of this Court). Appellants' motion in the Court of Appeals for a rehearing en banc was denied May 5, 1965.

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The United States Court of Appeals for the District of Columbia Circuit rendered no opinion.

JURISDICTION

A per curiam Order affirming the decision below was entered on March 16, 1965 and a per curiam Order denying a petition for rehearing en banc was entered May 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Did the Trial Court err in instructing the jury on criminal intent and in responding to the jury's request for copies of the penal statutes involved by sending typed excerpts to the jury without an adjuration as to criminal intent?

STATUTES INVOLVED

Title 15 USC 77q(a)—Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly

(1) to employ any device, scheme, or artifice to defraud,

(2) (not pertinent and omitted).

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

22 D. C. Code—1202. Embezzlement by Agent, attorney, clerk, servant, or agent of a corporation.

If any agent, attorney, clerk, or servant of a private person or copartnership, or any officer, attorney, agent, clerk or servant of any association or incorporated company, shall wrongfully convert to his own use, or fraudulently take, make way with, or secrete, with intent to convert to his own use, anything of value which shall come into his possession or under his care by virtue of his employment or office, whether the thing so converted be the property of his master or employer or that of any other person, copartnership, association, or corporation, he shall be deemed guilty of embezzlement, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment for not more than ten years, or both. (Mar. 3, 1901, 31 Stat. 1325, ch. 854, § 834.)

22 D. C. Code—2201. Grand larceny.

Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, § 826; Aug. 12, 1937, 50 Stat. 628, ch. 599; June 29, 1953, 67 Stat. 99, ch. 159, § 215(a)).

22 D. C. Code—2203. Larceny after trust.

If any person entrusted with the possession of anything of value, including things savoring of the realty,

for the purpose of applying the same for the use and benefit of the owner or person, so delivering it, shall fraudulently convert the same to his own use he shall, where the value of the thing so converted is $100 or more, be punished by imprisonment for not less than one nor more than ten years, or by a fine of not more than $1,000, or both; and where the value of the thing so converted is less than $100 he shall be punished by imprisonment for not more than one year or by a fine of not more than $500 or both: *Provided,* That nothing contained in this section shall be construed to alter or repeal any section contained in this chapter. (Mar. 3, 1901, ch. 854, § 851b, as added Mar. 3, 1913, 37 Stat. 727, ch. 108, and amended Aug. 12, 1937, 50 Stat. 629, ch. 599; June 29, 1953, 67 Stat. 99, ch. 159, § 215 (g).)

STATEMENT

The indictment of appellants, Earl J. Lombard (hereinafter referred to as Lombard) and Guardian Investment Corporation, (hereinafter referred to as Guardian), charged them with violation of Section 77q(a) of the Securities and Exchange Act of 1933, larceny, larceny after trust and embezzlement arising out of certain stock transactions with nine complaining witnesses. There were, therefore, 36 counts and, since each of the defendants was charged with each offense, a total of 72 counts in the indictment. All of the offenses were alleged to have been committed between May 1, 1961 and March 1, 1962.

During the period from December 30, 1960 to April 30, 1962, Guardian took in $208,634.63 from customers (552) and paid out $181,538.60 to customers (553). The money involved in the transactions covered by the indictment amounts to $7,625.00 (755). (All references herein are to the reporter's transcript of proceedings in the Trial Court).

At the conclusion of the government's case both defendants moved for a judgment of acquittal on all counts (939). The motions were denied (966).

At the end of the trial, the motions were renewed by defendants (1161). The Court again denied the motions (1177).

In instructing the jury, the Court said, *inter alia,*

> "Ordinarily, intent cannot be proven directly, as it is not humanly possible to read or see the operations of the mind of another human being. Ordinarily, therefore, intent must be inferred from the circumstances, from the nature of the act done; and a person is presumed to intend the natural and probable consequences of his act."

One hour and a half after the jury had retired, the jurors sent a note to the judge saying, "Title 15, United States Code, 77q(a). 22 D. C. Code, 1202, 2201 and 2203. Please furnish the above to this jury." Typed pertinent excerpts from the statutes were supplied to the jury by the Court over objection by the defendants.

Both defendants were found guilty of violation of the Security and Exchange Act and of embezzlement.

Both defendants moved for judgment of acquittal N.O.V. or for a new trial and these motions were denied.

On appeal to the Court of Appeals for the District of Columbia Circuit, the Court, per curiam, entered an Order affirming the judgment below. A petition for a rehearing en banc was denied, per curiam. The Order stated that Judge Skelly Wright would have granted the petition.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with the decision of this Court in *Morrissette* v. *United States,* 342 U.S. 246. In that case Mr. Justice Jackson pointed out that "the trial court may not withdraw or prejudge the issue by an instruction that the law raises a presumption of intent from an act." (274)

> "A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary." (275)

2. The decision of the Court of Appeals is in conflict, without distinction having been drawn, with its own decision in *Anzoategui* v. *United States,* (1964) — U.S. App. D.C. —, 335 F. 2d 1000, in which the Court said:

> "As in Morrissette, there was no doubt about the taking. Appellant contended throughout that there had been no evil intent. But our trial judge instructed the jury that the appellant's 'intent may be deduced from circumstances and from things done and from things said and a person is presumed to intend the natural and probable consequences of his act.' That axiom, true enough in so many situations, is certainly no substitute for a finding by the trier

of guilty intent when, as here, intention is in fact and in law an ingredient of the offense charged." (1002, n. 9).

3. The decision of the Court of Appeals is in conflict, without distinction having been drawn, with its own decision in *Byrd* v. *United States,* (1965) — U.S. App. D.C. —, 342 F. 2d 939, in which the Court held that an instruction on robbery, which included only a reading of the robbery statute was not sufficient since the statute does not set forth all the essential elements of the offense. The Court said: "It was fundamental error to send the case to the jury without instructions as to the elements of the offense which the government must prove beyond a reasonable doubt before a verdict of guilty can be returned." Even though in petitioners' case the Court had earlier instructed on criminal intent, the reasoning in *Byrd* should apply here since the jury had been out for an hour and a half, had asked only for the statutes and received only the statutes.

4. The decision of the Court of Appeals is in conflict with a decision of the Court of Appeals for the 7th Circuit in *United States* v. *Donnelly* (1950), 179 F. 2d 227, in which that Court held that where two instructions are given to the jury one erroneous and prejudicial, and the other correct, (as here) since it is impossible to tell which one the jury followed, the erroneous and prejudicial instruction constituted reversible error. It is submitted that this Court should make this rule universal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BYRON N. SCOTT
Attorney for Petitioners

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

Criminal 471-63

No. 18,725

EARL J. LOMBARD, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Criminal 471-63

No. 18,748

GUARDIAN INVESTMENT CORPORATION, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeals from the United States District Court for the District of Columbia

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Before: EDGERTON, Senior Circuit Judge, and DANAHER and BURGER, Circuit Judges

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia and were argued by Counsel.

ON CONSIDERATION WHEREOF it is Ordered and Adjudged by this Court that the Judgment of the District Court appealed from in these cases is Affirmed.

Per Curiam

Dated March 16, 1965

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 209

EARL J. LOMBARD and GUARDIAN INVESTMENT CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* affirmance of the court of appeals is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1965 (R. 51). A petition for rehearing *en banc* was denied on May 5, 1965 (R. 52). The petition for a writ of certiorari was filed on June 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly instructed the jury on criminal intent.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the District of Columbia on numerous counts charging securities frauds and the related local crime of embezzlement (R. 2-32, 42). Petitioner Earl J. Lombard was sentenced to concurrent terms of imprisonment—twenty months to five years—on each count (R. 49). Petitioner Guardian Investment Corporation was fined $500 on each embezzlement count and $1,000 on each Securities Act count (R. 50). The court of appeals affirmed.

The evidence showed a repeated pattern of purported sales of securities and failure to consummate the transactions after obtaining the victims' money. Petitioner Lombard, an attorney, controlled petitioner Guardian's operations and was personally aware of the fraudulent transactions. He was paid substantial sums by Guardian in the form of expenses of his office and legal fees.

ARGUMENT

Although petitioners seek to raise an issue as to the instruction on criminal intent, the charge to the jury is not included in the record certified to this Court. The full charge shows that the trial judge properly instructed the jury. He said in part:

> You are instructed with respect to each of the offenses charged in this indictment, the intent to defraud is an essential element of the crimes charged and proof of this intent, beyond a reasonable doubt, with respect to the defendants, or either of them, is ultimately a question of fact for the jury. You are instructed that fraudulent intent, as a mental element of crime, is often difficult to prove by direct and convincing evidence. In many cases it must be inferred from a series of seemingly isolated acts and instances. When these are sufficiently numerous they may in their totality properly justify an inference of a fraudulent intent; and this is true even though each act or instance, standing by itself, may seem rather unimportant.
>
> Stated otherwise, to act with "intent to defraud" means that a person acts knowingly with specific intent to deceive or cheat, for the purpose of causing some financial loss to another and bringing about some financial gain to himself.

In the light of this specific instruction on fraudulent intent, the instruction that a person is presumed to intend the natural and probable consequences of his act was proper. See *Estes* v. *United States*, 335 F. 2d 609, 615-617 (C.A. 5), certiorari denied, 379 U.S. 964, and cases there cited. When, at the request of the jurors, the court submitted excerpts from the applicable statutes (R. 40-41), there was no reason to repeat other instructions not requested by the jurors. *Orton* v. *United States*, 221 F. 2d 632, 636 (C.A. 4), certiorari denied, 350 U.S. 821.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
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Attorneys.

JUNE 1965

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REPLY BRIEF IN OPPOSITION TO RESPONDENT'S BRIEF

BYRON N. SCOTT
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REPLY BRIEF IN OPPOSITION TO RESPONDENT'S BRIEF

REPLY

The Evidence

Respondent's truncated statement of some ten days of evidence and testimony on 72 counts in the indictment, couched in terms most favorable to the prosecution, shows by what it does not say that there was, as is usually the case, no direct evidence of the required criminal intent on the part of the defendants. The

individual defendant contended throughout that there had been no evil intent on his part. The evidence also showed that the defendant corporation, during its brief existence, handled total sales of more than $280,000.00 and that the amounts involved in all of the transactions complained of totalled approximately $7,500.00. The evidence also showed that, when each sale was made, the defendant corporation promptly ordered the stock involved if it was not on hand or otherwise available even though at the time of delivery the corporation was unable to pay for it.

The evidence also showed that the petitioner, Lombard, did everything within his power to make the corporate activities successful. He refused to accept any salary after August 4, 1962. He and Dipboye invested $5,000.00 on October 5, 1962 which was after most of the sales charged in the indictment. He met with a Richard Mandel and others in February 1963 at which time Mandel was still considering the investment of sufficient capital in the corporation to solve all corporate difficulties, pay all debts and permit the corporation to resume business.

Defendant Lombard told each of the complaining witnesses that he believed that they would get their stock and that the corporate difficulties would be worked out. There was no evidence that he gave these assurances in bad faith or without reasonable grounds to believe that they were true. Most of these assurances were made prior to or shortly after the additional investment of $5,000.00 by Lombard and Dipboye; prior to or shortly after Lombard refused to accept his salary on August 4, 1962; and several months prior to the meeting with Mandel and others in February, 1963.

The Presumption Instruction

The instruction quoted by respondent in its opposition was one requested by the Government and was given after the instruction quoted by petitioner.

The Court's attention is respectfully called to the fact that respondent has made no attempt in its brief to distinguish the instant case from the *Anzoategui* case, 118 U.S. App. D.C. 337, 335 F. 2d 1000, cited by petitioner, but has simply gone to the Fifth Circuit for supporting authority. If the cases are not distinguishable, the writ should be granted to settle the conflict between the Circuits. But the case of *Estes* v. *United States,* 335 F. 2d 609, cert. den. 379 U.S. 964, cited by respondent is clearly distinguishable from the instant case and the *Anzoategui* case cited by petitioner. In *Estes,* the Court was careful to say that the presumption that a man intends the natural consequences of his acts is a rebuttable one. Our judge didn't say this, and therein lies the conflict, created by this case, between this Circuit and the Fifth Circuit. In *Estes,* the instruction complained of was followed immediately by the statement that "Fraudulent intent is one of the essential elements of the offenses with which this defendant is charged. Fraudulent intent is not presumed or assumed." Our judge didn't say this.

The Bare Bones of the Statute Instruction

Respondent cites *Orton* v. *United States,* 221 F. 2d 632, (C.A. 4), certiorari denied, 350 U.S. 821, as authority for the statement that "when, at the request of the jurors, the Court submitted excerpts from the applicable statutes, there was no reason to repeat other instructions not requested by the jurors." The *Orton* case doesn't even approach the factual situation of

the instant case. In *Orton,* the Court gave the Allen charge. Nothing was said there in the new instruction about the elements of the crime charged. In *Orton,* appellant objected because the judge did not repeat the instruction on presumption of innocence. In the instant case the objection is that the judge gave the jury only the bare bones of the statutes without reminding them that the case law requires a finding of specific criminal intent, unmentioned in the statutes, as an element of each of the crimes charged in the indictment.

Conflicting Instructions

In *Bollenbach* v. *United States,* 326 U.S. 607, 612, the jury had asked for additional instructions. The judge gave them an erroneous instruction. Certiorari was granted by this Court and Mr. Justice Frankfurter said for the Court: (611)

> "But precisely because it was a 'last minute instruction' the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were 'hopelessly deadlocked' after they had been out seven hours, * * * The influence of the trial judge on the jury is necessarily and properly of great weight and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be a decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge. (612) * * * A conviction ought not to rest on an equivocal direction to the jury on a basic issue." (613).

While the jury in the case at bar did not report itself deadlocked, and had been out only an hour and a half,

it did ask for additional instructions and received, as "a last minute instruction", what our Court of Appeals has heretofore called an erroneous instruction in *Byrd* v. *United States,* U.S. App. D.C. , 342 F. 2d 939.

Since the presumption charge was erroneous and error was committed by sending the jury the statutes without a reminder that the statutes did not enumerate all of the essential elements of the crime, and since the instructions were conflicting, misleading and equivocal, it is respectfully submitted that the petition should be granted.

BYRON N. SCOTT
Attorney for Petitioners